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No. 09-1213

Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

TIMOTHY CHARLES LAMB,

Petitioner,

v.

STATE BOARD OF LAW EXAMINERS,
STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA

REPLY BRIEF

Timothy C. Lamb
Representing Pro Se
P.O. Box 5562
Grand Forks, ND 58206-5562
(701) 330-1575
tclamb@earthlink.net

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ARGUMENT

In response to Respondent's Brief in Opposition, filed on May 10, 2010, Petitioner submits this Reply Brief. In review, the primary issue presented in this case is whether the Petitioner was deprived of his due process rights in a formal proceeding to decide his license and employment opportunities because he was denied discovery of essential, relevant evidence.

I. Respondent's Brief Misrepresented a Material Fact

First, and foremost, Respondent's main argument is premised on a false and misleading representation of the facts. Respondent states that, "Petitioner has not yet even had the formal hearing he requested." Resp. Brief at 8. This statement of fact was repeated later in the brief, stating, "[s]ince the hearing pursuant to North Dakota's admission to practice rules has not taken place yet." Id. at 10. This is an absolute false and misleading statement of fact in this case.[1]

To correct the record before the Court, a copy of the Notice of Hearing is at Appendix 1a. A stay of the proceeding was requested pending the outcome of Lamb's Petition for Writ of Certiorari, but it was denied. See Appendix 2a.

The hearing requested by the Petitioner from

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1. The formal hearing was held at 9:00 a.m., April 9, 2010, in the Lewis and Clark Room, North Dakota State Capitol Building. Present were the three members of the State Board of Law Examiners, their attorney, Ronald H. McLean, and the Petitioner, Timothy C. Lamb.

the results of his February 2008 bar exam took place on April 9, 2010, over two years after the date he requested it. At the hearing, Respondent's attorney acknowledged receiving Petitioner Lamb's Petition for a Writ of Certiorari, filed on April 7, and a copy of it was duly submitted as an exhibit at the hearing. Petitioner was unable to make any substantiated arguments at the hearing, however, because the evidence he sought was suppressed by the board, and that decision was affirmed by the ruling in this matter by the State Supreme Court, which is at issue here. In effect, the hearing was largely a pro forma proceeding to preserve the Petitioner's rights in this matter.

Since he was at the hearing, Respondent's attorney should be held accountable for this virtual fraud on the United States Supreme Court. This misrepresentation is particularly disturbing because it is a material fact, and is being used to persuade the Court into denying cert. In effect, Respondent is misleading the Court into believing that Petitioner's rights have not been violated because the hearing "has not taken place yet." In fact, the hearing did take place, albeit dysfunctional. Our legal system cannot function properly when there is stonewalling and misrepresentation of the relevant facts.

II. Lower Court's Decision Conflicts with Federal Case Law

Second, Respondent's characterization of the law is misleading. Respondent cites that Fields v. Kelly was not in conflict with the lower court's opinion in this matter. Resp. Brief at 4. In fact, in Fields v. Kelly, the federal court stated, in pertinent part, "North Dakota case law also shows that state

courts can grant a writ of mandamus to remedy violations of the North Dakota open records laws, [citation omitted], an option which Fields did not pursue." Fields v. Kelly, 986 F.2d 225, 228 (8th Cir. 1993). This federal ruling conflicts with the lower court's ruling in this case, since the Petitioner sought a writ of mandamus to compel critical evidence from the state board, and was denied. Lamb v. State Board of Law Examiners, 2010 ND 11, 777 NW2d 343 at ¶1. Of note is the fact that the Fields decision came after the adoption of Rule 13, N.D. Admission to Practice Rules, which was in 1990. Id. at ¶10. Rule 13 was the basis for the lower court's decision. Id. at ¶11.

Here, in this matter before the Court, Petitioner's main argument is that his due process rights under the United States Constitution have been infringed upon by the lower court's ruling. The Fields case presented a different set of facts. Indeed, the federal court explained in a footnote that, given the situation, state courts discharge their duties in supervising the admission process, "not interpreting the due process clause of the United States Constitution." Fields, supra, at 227-28, note 3. Thus, state court rulings under these circumstances are not on point. So, there are no conflicting state court opinions.

Further, the federal court held that because Fields had not exercised his right to seek a writ of mandamus to compel certain evidence, his due process rights were not violated. Id. at 228. In this case, Petitioner sought a writ of mandamus and it was denied. He, therefore, had no evidence to support his arguments before his hearing on April 9, 2010. Given the facts in this case before the Court, where Petitioner exercised his right to a remedy and

was denied, the lower court's decision directly conflicts with Fields.

Under the reasoning in Fields, the federal court would likely rule the Petitioner's due process rights have been deprived since Petitioner Lamb has exhausted his legal remedies in seeking discovery of the evidence he needs to prove his case that the bar exam he failed by only a couple of percentage points was flawed. Since only 47 percent passed the exam in February 2008, the flawed assertion may have merit. The 47% pass rate compares to a 76% pass rate in February 2005 bar exam, and an overall 10-year average pass rate of 80% in North Dakota. The Bar Examiner, National Conference of Bar Examiners (May 2008), at 22.

III. The Lower Court's Decision Conflicts with Relevant U.S. Supreme Court Decisions and the U.S. Constitution

The test invalidity assertion in this case is founded on somewhat technical grounds, so other state and federal cases with a similar factual comparison have not been found. However, principles of due process apply, which should take this case beyond the scope of interpreting state laws. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) (holding that, "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but an qualification must have a rational connection with applicant's fitness or capacity to practice law." [Emphasis added, citations omitted.] Petitioner is asserting that the evidence he has been denied will show that there is a lack of "rational connection" in the standard-setting

judgment by the State Board. In Schware, the Court also found that, "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." Dent v. West Virginia, 129 U.S. 114 (1889), [other citations omitted]. Id.

By denying Petitioner the information he needed to show the State Board was acting arbitrarily and without a "rational connection", the lower court's decision violated the U.S. Constitution.

Experts in the field of testing strongly agree that the evidence Petitioner is seeking should be readily made available for review. See, e.g., Setting Performance Standards: Concepts, Methods, and Perspectives, Gregory J. Cizek, (Lawrence Erlbaum Associates, 2001), at 442 (stating: "Although licensing and certifying examinations have generally withstood judicial scrutiny, it is in the best interest of a licensing authority or certifying entity and the public it serves to have as much evidence as possible available to support its standard-setting judgment."). It follows that such evidence protects the credibility of the exam, the public's interest, as well as the stakeholder's assurance that the exam is reliable, valid and fair.

A test taker is a stakeholder and has a right to take a test that is fundamentally sound under psychometric standards. See, e.g., Standards for Educational and Psychological Testing, (the Standards) published by the American Educational Research Association, the American Psychological Association, the National Council of Measurement in Education, 1966, revised 1999; Standards for the Accreditation of Certification Programs, National Commission for Certifying Agencies, 2004; and Code

of Fair Testing Practices in Education (2004); all suggesting that current technical information to support the reliability, validity, scoring and reporting processes, and other relevant assessments of the testing procedures should be made available to stakeholders.[2] These professional testing standards apply to licensing examinations for certified public accountants, health care providers, architects, and other professional licensing exams. Standards for the Accreditation of Certification Programs, supra.

In Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 1007 (1988), footnote 5, this Court acknowledge the use of the Standards in measuring the reliability, validity and fairness of the EEOC

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2. Citing from Standards for the Accreditation of Certification Programs, National Commission for Certifying Agencies, 2004, which is derived from the Standards, the following standards apply to their professional licensing tests:

Standard 11: "The certification [or licensing] program must employ assessment instruments that are derived from the job/practice analysis and that are consistent with generally accepted psychometric principles."

Standard 12: "Cut scores must be set using information concerning the relationship between assessment performance and relevant criteria based on the standard of competence." ... "A report must be published documenting the methods and procedures used to establish the standard of competence and set the cut score, along with the results of these procedures."

Standard 13: "The [licensing] program must document the psychometric procedures used to score, interpret, and report assessment results."

Uniform Guidelines for testing.

The main issue here comes from the procedural due process right to evidence that supports Petitioner's arguments that the test he failed was flawed. He has had a hearing before a state board that is determining his ability to be licensed to practice law, which impacts his employment opportunity. This right presents a U.S. Constitutional due process issue of federal significance. See, e.g., Greene v. McElroy, 360 U.S. 474 (1959); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Dent v. West Virginia, 129 U.S. 114 (1889).

This Court has authority to settle the federal issue presented in this case. The lower court was presented with the U.S. Constitutional federal question, and it stated, "We have considered the remaining arguments raised by Lamb and determine them to be unnecessary to our decision or without merit." Lamb v. State Board of Law Examiners, supra, at ¶12.

Certiorari should be granted because this Court has a long history of ensuring that the due process clause of the U.S. Constitution is adhered to by the States. There is no reason to deny Petitioner the right to review critical evidence that the State Board has in its possession, which would allegedly show that the bar exam has a flawed "rational connection." By denying the information, the Board is only hiding behind a cloak of secrecy it deems "confidential" under Rule 13, N.D. Admission to Practice Rules, which indicates a lack of examination credibility. The bar exam's development and administration is not a matter of being confidential, it's a matter of integrity, validity, reliability and fairness of the examination process. By denying the

evidence requested, more questions are raised about the credibility, validity and integrity of the exam. This is not a "confidential" matter, it is information that the public has a right to know, as well as do the examinees, according to experts in the field of test measurement. Standards, supra.

IV. The Denied Information Leads to Whether the State Board Acted Arbitrarily and Without a "Rational Connection"

At stake here is whether a state can lawfully deprived a person of information that may lead to the conclusion that an arbitrary mistake was made in determining whether to recommend a license based on a flawed exam. The evidence Petitioner is seeking will show whether or not the state is following generally acceptable standards in administering the bar exam and there exists a "rational connection" in its standard-setting judgment. That is a due process issue that this Court has authority to oversee as shown in supporting case law, Greene, Schware, supra.

The issue before the Court is about accountability, enforcing professional testing standards, and the integrity of the bar exam. Petitioner has a right to evidence that may show the board is not administering the exam properly, which will determine if the State Board acted arbitrarily, capriciously, and without rational basis. This is a professional, high stakes exam, and it must comport with professional standards in test development and administration. The evidence Petitioner seeks is about the testing standards, and not about the state's authority to admit licensed attorneys, which is well settled law. Schware, supra.

For example, if the minutes of the State Board's meeting were available for review, it could be ascertained whether the board was properly reviewing the cut score and whether there was discussion relating to the rational basis for determining the cut score. But the board's minutes are "confidential" under Rule 13, North Dakota Admission to Practice Rules. Also denied was information relating to how the graders were trained, whether their ratings have been calibrated to ensure consistency under psychometric standards, whether proper security measures are being maintained, and whether psychometric standards are being used to ensure that the standard of "minimum competency" to practice law is being tested by the bar exam. These are relevant questions that are pertinent to whether there is a "rational connection" to the test standards and the judgments made based on those standards. The Petitioner was denied the information relating to them. Lamb, supra, at ¶3.

Whether a state board's actions were arbitrary was the issue in In Re Reardon, 378 A.2d 614, 618 (Del.Supr. 1977) (finding that, "[t]he primary function of the Board of Bar Examiners is to measure professional competence; the purpose of the Bar Examination is to distinguish those applicants who appear to have the minimal competence for the practice of law." Id.

An expert psychometrician would have provided an expert opinion of the State Board's standard-setting judgment if given relevant examination information, but the evidence was suppressed. Under the Standards, supra, licensing authorities, like the State Board in this instance, have a responsibility for providing technical

REPLY BRIEF APPENDIX

Notice of Hearing

Notice of formal hearing for
Timothy Charles Lamb for the
February 2008 bar exam..... 1a

Order

Order Denying Motion for Stay
Pending the Outcome of the
Petition for Writ of Certiorari..... 2a

In The Matter of the Request for a Formal Hearing of Timothy Charles Lamb February 2008 Bar Exam	))))	NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that pursuant to Rule 10(B)(3), Admission to Practice Rules, a formal hearing in this matter has been set before the North Dakota State Board of Law Examiners, commencing at 9:00 a.m. Central Time on the 9th day of April, 2010, in the Lewis and Clark Room in the State Capitol Building, Bismarck, North Dakota.

The Petitioner's pre-hearing brief is due on March 23, 2010, and the Board's pre-hearing brief is due on April 5, 2010.

Petitioner is hereby advised that he has the right to be represented by counsel and to present witnesses on his own behalf.

Dated this 11th day of March, 2010, at Bismarck, North Dakota.

/s/
Courtney Koebele
Assistant Bar Admissions
Administrator
State Board of Law Examiners

STATE OF NORTH DAKOTA
STATE BOARD OF LAW EXAMINERS
FORMAL HEARING PANEL

In the Matter of the Formal Hearing Regarding the Application of Timothy Charles Lamb for Admission to the Bar of North Dakota Based on February 2008 Bar Examination	)	**ORDER**

On March 22, 2010, Timothy Lamb filed a Motion for Stay of these proceedings "until the judicial process of a petition for a writ of certiorari by the United States Supreme Court is decided regarding the North Dakota Supreme Court's decision, Lamb v. State Board of Law Examiners, 2010 ND 11, 777 N.W.2nd 343, N.D. Supreme Court No. 20090131." The Hearing Panel considered the matter, and

ORDERED, that the Motion for Stay is DENIED.

Dated this 25th day of March, 2010.

/s/
Mark Stenehjem, Chair
Hearing Panel